No. 75-874

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

CAROLINE DRAKE WHITE,
MARY LYTLE WHITE, AND
NOAH LYTLE WHITE

Petitioners,

v.

STATE OF ALABAMA

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

John H. Lewis
2216 10th Avenue South
Birmingham, Alabama [illegible]
Attorney for Petitioners

December 20, 1975

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John H. Lavette
2316 - 10th Avenue South
Birmingham, Alabama 35205
Attorney for Petitioners

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The petitioners, CAROLINE DRAKE WHITE, MARY LYTLE WHITE, AND NOAH LYTLE WHITE, pray that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Alabama rendered in the proceedings on September 11, 1975, and for which defendant subsequent request for rehearing was denied on October 2, 1975.

OPINIONS BELOW

The opinion of the Alabama Supreme Court is reported at 9 A.B.R. 1900, and is set forth in Appendix A. The order of the Alabama Supreme Court denying rehearing to which there was no opinion is likewise set forth in Appendix A. The Circuit Court of the Tenth Judicial Circuit for Jefferson County, Alabama rendered no formal opinion; its order, denying the relief requested is set forth in Appendix C.

JURISDICTION

The judgment of the Alabama Supreme Court was entered on September 11, 1975 (Appendix A). A petition for rehearing, timely filed, was denied on October 2, 1975 (Appendix A). This petition for certiorari was filed less than 90 days from the aforesaid date on which rehearing was denied. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether the Constitution of the United States today requires that the reasonable expenses incurred by a citizen property owner in defending his property in Eminent Domain proceedings must be paid to the citizen property owner in addition to the value of his

property taken as a necessary and vital part of "Just Compensation."

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "nor shall any state deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

Probate Court. On April 8, 1971, the Probate Court entered an order granting respondent's application to condemn and appointing Commissioners. The appointed Commissioners made an award for petitioners' property of $172,500.00 on May 3, 1971. An Order of Condemnation was entered in the Probate Court on June 3, 1971, and the State of Alabama filed notice of appeal of the award to the Jefferson County Circuit

Court on June 4, 1971, inasmuch as the award of the Commissioners was greatly in excess of $79,200.00, which sum represents the amount of money offered the property owners for their property prior to the institution of the proceedings.

Jefferson County Circuit Court. Due to the complex nature of the circumstances surrounding the litigation extensive discovery was required, and in order to ascertain the true and correct value of the property taken, three expert appraisers were hired by the property owners to appraise the property and testify at trial; and, because of the critical issue surrounding highest and best use many maps, exhibits, overlay acetate arrangements, zoning maps, aerial photographs, sewer maps, etc. had to be professionally prepared for trial of the case, all of which resulted in a great and burdensome expense to the property owner petitioners.

With the issues of value thus drawn the case came to trial on June 10, 1974. Ten days later on June 20, 1974, the jury affixed the award for appellants' property taken and damage to remainder at $128,800.00. Accordingly, on July 1, 1974, the Circuit Court entered the Order and Decree of Condemnation in the amount of $137,866.61 which represented the jury award of $128,800.00 and interest due the property owner appellants of

$9,066.61.

Motion to Tax Further Costs. On July 26, 1974, all bills and charges having come in and the costs to the property owners of defending in the litigation now being known, attorneys for petitioners filed a timely motion to tax further and additional costs against the State of Alabama in the amount of $35,000 and asking for such other and further relief to which they might be entitled. (Appendix B). The sum of $35,000 was the actual cost incurred by petitioners in defending their property against the condemnation effort of respondent, State of Alabama. This expense resulted in a net reduction of $35,000 from the sum of $128,800 (jury verdict) or $137,866.61 (jury verdict plus interest due). This deduction of $35,000 in expenses substantially lessened the sum of money received by petitioners and prevented petitioners from realizing the full amount of "just compensation" as required by the Fifth and Fourteenth Amendments to the Constitution of the United States. The petitioners were not thereby granted just compensation by the judicial process as is their right under the Constitution and were not "made whole" in accordance with the Constitutional Guarantee.

Petitioners motion (Appendix B) was heard by the Hon. Judge Whit Windham, trial judge in the case, on August 16,

1974, and overruled the same day (Appendix C). The petitioners were given and duly reserved an exception inasmuch as it was their opinion that "just compensation" and "due process of law" had been denied.

Supreme Court of Alabama. An appeal was timely taken to the Alabama Supreme Court on August 30, 1974, and the issues of "just compensation" and "due process of law" were again raised through assignments of error (Appendix B), in brief, and in oral argument. The court affirmed the order of the trial court on September 11, 1975 with two members of the Court dissenting (Appendix A), and denied rehearing on October 2, 1975 (Appendix A). Petitioners' Federal claims under the Constitution of the United States were thus made at the earliest opportunity and were renewed on appeal.

REASONS FOR GRANTING THE WRIT

1. THE PRESENT INTERPRETATION OF "JUST COMPENSATION" BY THE JUDICIAL PROCESSES OF ALABAMA IS REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

In Dohany v. Rogers, 281 U.S. 551 (1930) this Court said, "Attorney's fees and expenses are not embraced within just compensation for land taken by eminent domain." This statement has been relied upon by condemnors through-

out America ever since to deny 'just compensation' to property owners who have their land applied to public use, and was relied upon by the court below. The property owners wish to directly attack this case inasmuch as it stands and is used as a license by condemnors everywhere to impose upon the citizen property owners of this nation a bureaucratic arithmetic that leaves them with less than their Constitutional Guarantee of Just Compensation.

Is the constitutional mandate of "just compensation carried out when a property owner is not placed in the same position monetarily as he would have enjoyed if his property had not been taken? Is it the purpose of "just compensation' to give the property owner only partial recovery? We think not and the sad facts of this case as enumerated above show all too well that as presently applied in Alabama 'just compensation" is at best ineffective in making the property owner whole and the citizens of the United States who reside in Alabama are being deprived of their Constitutional rights.

The majority of the State Courts over the years seem to have adopted Johany as the standard in definition of "just compensation" and this tired old case has been employed time and again to deny the people their full measure of 'just compensation." The trend among

the States is to reject the Dohany Rule as not being full or broad enough to fulfill the State Constitutional promise. And, the time has come to strike this case from the authoritative law of this nation inasmuch as the rule that sprang from it no longer is capable of providing the citizen property owner with the full "just compensation" as promised by the Constitution of the United States.

Stewart & Grindle, Inc. v. State, 524 P.2d 1242 (Alaska 1974); City of Oakland v. Pacific Coast Lumber and Mill Co., 172 Cal. 332, 156 P.2d 468 (1960); Dade County v. Renado, 147 So. 2d 313 (Fla. 1962); Jacksonville Expy. Authority v. DuPree, 108 So. 2d 289 (Fla. (1962); Dade County v. Brigham, 47 So. 2d 602, 18 A.L.R.2d 1221 (Fla. 1950); In Re Water Supply in City of New York, 125 App. Div. 219, 109 N.Y.S. 652; State v. Kodama, 483 P.2d 857 (Wash. 1971); State v. Roth, 78 Wash. Dec. 2d 730, 479 P.2d 45 (1971); State v. Forrest, 78 Wash. Dec. 2d 740, 479 P.2d 45 (1971).

It is the power and duty of this Court to act as the living voice of the Constitution and it is only through change in its voice that our Constitution - "by the people, for the people" - has weathered through time and gained strength through the years. This was recognized by Justice McKenna when he wrote.

'Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.' Weems v.

United States, 217 U.S. 349, 373 (1910).

This ageless statement by Justice McKenna shows that from an early date this Court recognized that the Constitutional safeguards are instilled with an innate capacity for growth to meet the new and changing needs of our society and the Court should expand these safeguards when justice so demands - as it does in the instant case.

Time has worked such changes that the rule set out in Dohany has outlived its usefulness and when it is applied under the times and circumstances of today as a judicial tool, it is incapable of producing justice. The Court when formulating this rule in 1939 could not have been cognizant of the changes 45 years would bring and how inapplicable the rule would be in our time. For instance, the American Institute of Real Estate Appraisers was not founded until 1932, and expert witnesses of an appraisal, cost, or engineering nature were unheard of at that time insofar as being employed for litigation in condemnation cases. Furthermore, the property owner today is forced to retain his own entourage of experts - at his own expense - to meet the array of experts of various natures, skills, and purposes retained by the condemnor. Therefore the expenses of defending his property are astronomical in comparison with the

days of Dohany. The Court in deciding Dohany in 1930 could not have foreseen these changes and the resulting expenses encountered by property owners in 1975, but neither would they have sanctioned such a burden of expense as is placed upon the property owner today.

The expansion of the degree and kind of condemnation since 1930 is one of the primary reasons such a burden is placed upon a property owner in 1975. For instance, in 1930 few people could afford the luxury of the automobile, the Interstate Highway System was not conceived until the mid '50's, Housing Authorities, Medical Centers, Urban Renewal, Civic Centers, etc., have sprung up all over creating great governmental bureau with staffs whose only purpose is to acquire property for public use. In brief, condemnation today is big business, and the acquisition process, which serves this condemnation business, brings down upon the heads of property owners a non-recoverable burden and cost of defense that surely constitutes an appropriation of their property without any measure of "just compensation" for said appropriation.

Is the Court aware that in Dohany the property owner was the plaintiff, whereas today he is the defendant, that the thrust of the action was to restrain the Highway Commissioners, Rogers, from acquiring Dohany's land to swap it to the railroad, and that the issue of

attorney's fees was a purely collateral issue, and that the Court has yet to deal with this great issue alone and directly in any other case?

Surely this Court, in a period which has seen an expansion of constitutional rights, cannot agree with the narrow meaning of "just compensation" set forth in Johany. It is for this reason that petitioners believe that the decision reached in the instant case by the Alabama Court would be in conflict with a decision reached by the United States Supreme Court today because times change, circumstances change, and so must the interpretation of the law change.

2. THE DECISION BELOW CONFLICTS WITH THE JUST COMPENSATION PRINCIPALS ENUNCIATED IN THIS COURT'S MONONGAHELA RULING.

The next authority leaned on, misused, and quoted extensively by the majority of the Alabama court is Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893) wherein the Court actually and pointedly rejects any thought that the legislature can say what compensation shall be paid or what shall be the rule of just compensation because the case specifically reserves these questions for the judiciary and opts for a liberal definition by the Court of "Just Compensation."

The majority of the Alabama Supreme Court extracted and quoted language from Monongahela out of contex and in direct contrast to the above simply because the extracted language served to lend credance to their position. A closer examination reveals that by extracting such language the Alabama court has materially altered and distorted the true meaning and intent of the Court's holding in Monongahela. If one will but look for it there is far superior thinking in the case which strikes down the proposition that "just compensation" is limited to the value of the real property alone or the proposition that the matter is a question for the legislature to the exclusion of the judiciary; therefore, petitioners point the Court to the following facts and circumstances surrounding Monongahela.

FACTS:

The United States was attempting to acquire from Monongahela Nav. Co. lock number 7 and the land thereunder which was located in Pennsylvania on the Monongahela River.

United States contended - that it owed the property owners for (1) land and (2) improvements only or an approximate sum of $161,733.13.

Property Owner contended - that United States owed for (1) land and (2) improvements AND (3) for the value of

the franchise of the company to collect tolls. The property owner maintained that all these elements must be included inasmuch as just compensation can only be full value to the owner. The property owner stated "That in view of the present and prospective tolls receivable at lock and dam No. 7, the present value of said lock and dam No. 7 is not less than $450,000.00..."

The result of the trial was a finding that the value of the lock and dam No. 7 was $209,000.00, "not considering or estimating in this decree the franchise of this company to collect tolls."

The property owner brought the case to the Supreme Court by both writ of eror and appeal.

Justice Brewer delivered the opinion of the Court and hereafter we quote other and different language used by Justice Brewer than that quoted by the Alabama Supreme Court:

> "The question presented is not whether the United States has the power to condemn and appropriate this property of the Monongahela Company, for that is conceded, but how much it must pay as compensation therefor. Obviously, this question, as all others

which run along the line of the extent of the protection the individual has under the Constitution against the demands of the government, is of importance: for in any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government."

"And in this there is a natural equity which commends it to every one. It in nowise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."

"Illegitimate and unconstitutional practices get

their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the rights, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encrochments thereon. Their motto should be obsta principiis."

"By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, not a legislative question. The legislature may determine what private property is needed for public purposes - that is a question of a political and legislative character; but when the taking has been or-

dered, then the question of compensation is judicial. It does not rest with the public taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry."

"The right of the legislature of the state, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case to determine what is the 'just compensation' it ought to pay therefore, or how much benefit it has conferred upon the citizen by thus taking his property without his consent or to extinguish any part or such 'compensation' by prospective conjectural advantage, or in any manner to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or toler-

ated under our Constitution. If anything can be clear and undeniable upon principals of natural justice or constitutional law, it seems that this must be so.

We are not, therefore, concluded by the declaration in the Act that the franchise to collect tolls is not to be considered in estimating the sum to be paid for the property."

"Whatever be the true value of that which it takes from the individual owner, must be paid to him before it can be said that just compensation for the property has been made."

"Just compensation requires payment, not merely of the value of the tangible property itself, but also of that of the franchise of which he is deprived."

This case was reversed and remanded with instructions to grant a new trial and the property owner's contention for a rounder and fuller definition of "Just Compensation" was sustained by the Court, thereby rejecting any thought that the legislature can define the rule of just compensation because this is a

question strictly for the judiciary.

Petitioners' position is best stated by Justice Brewerer in Monongahela at 631 where he wrote:

> "Surely reasoning which leads to such a result must have some vice, at least the vice of injustice."

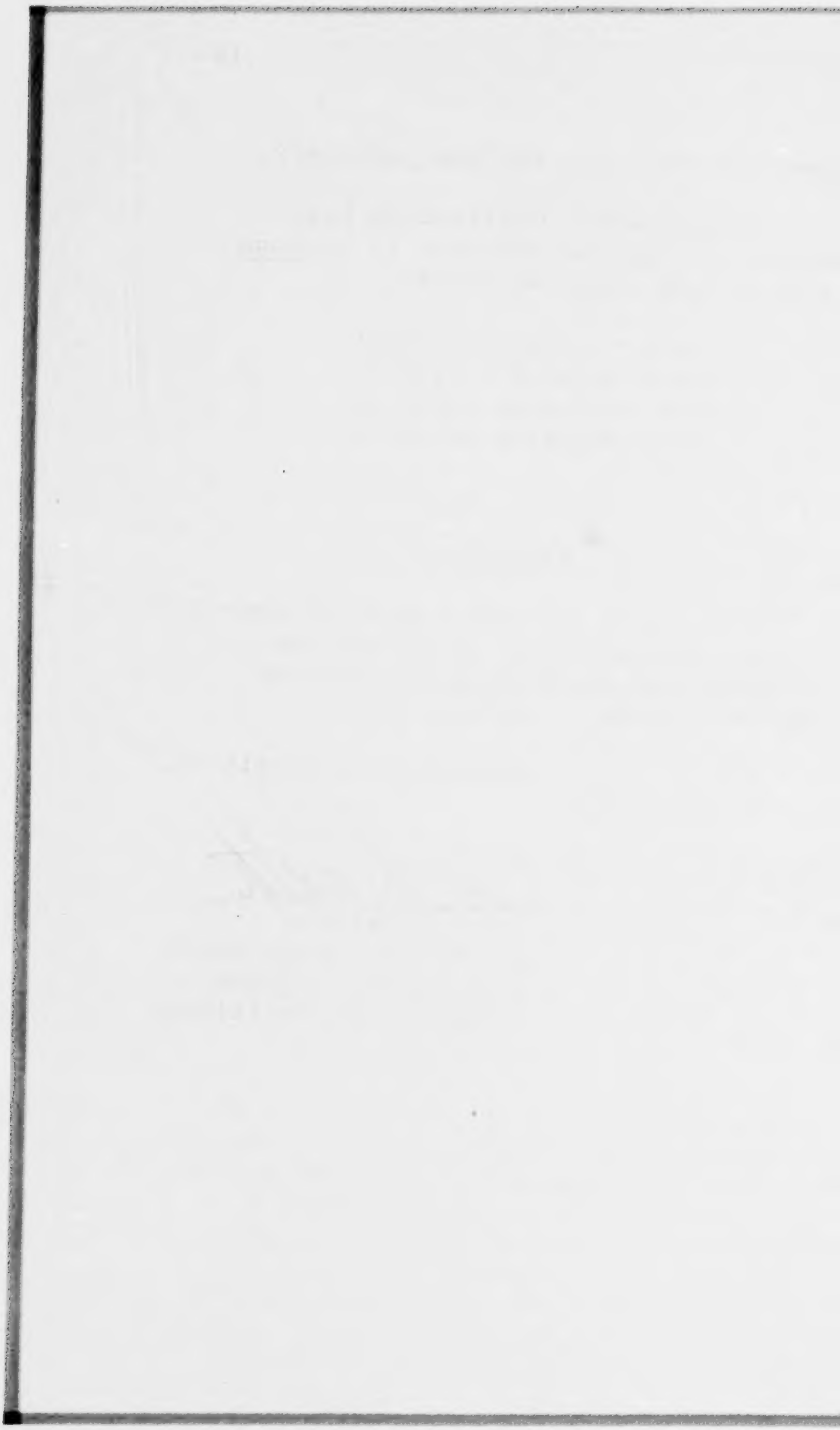
CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Alabama Supreme Court.

Respectfully submitted,

December 10th 1975.

John H. Lavette
2316 10th Avenue South
Birmingham, Alabama
Attorney for Petitioner



Appendix A
#1
Opinion of Alabama Supreme Court

THE STATE OF ALABAMA ----- JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1975

Carolyn Drake White, et al

S.C. 974 v.

State of Alabama

Appeal from Jefferson Circuit Court

MADDOX, JUSTICE.

"Attorney's fees and expenses are not embraced within just compensation for land taken by eminent domain."

This short, concise and direct quote, taken from Dohany v. Rogers, 281 U.S. 362, 368, 50 S.Ct. 299, 74 L.Ed. 904 (1930), sustains the trial court's judgment that attorneys' fees and litigation expenses are not recoverable costs in an eminent domain proceeding.

The landowners, after a judgment was entered in circuit court based upon a jury verdict, filed a motion with the

trial judge asking him to direct the circuit clerk to tax $35,000 as costs to pay their attorneys' fees and expert witnesses' fees. The court overruled their motion and they appealed. We affirm.

The landowners cite three broad theories to support their argument that they should recover their attorneys' fees and litigation expenses. First, they say that Title 19, Section 30, Code, /1 authorizes the court to tax these expenses as costs. We disagree. In a long line of cases this Court has held

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/1. "The costs of the application and proceedings thereunder, including the compensation of commissioners, who shall receive reasonable compensation to be fixed by the judge, must be adjudged and assessed against the applicant and his surety for costs, for which execution may issue. But should the applicant tender to the landowner or other party interested therein, prior to the application for condemnation, a sum of money in excess of that awarded by the commissioners, which tender he has kept good until the time of trial by paying the same into court to await the result of the proceedings, in which case the costs of the proceedings shall be taxed against the landowner or other party; but the commissioners awarding damages shall have no knowledge of the amount so tendered, and shall so certify in their award."

that in the absence of contract, statute, or recognized ground of equity, there is no inherent right to have attorneys' fees paid by the opposing side. City of Vestavia Hills v. Randle, 292 Ala. 492, 296 So. 2d 710 (1974); Johnson v. Gerald, 216 Ala. 581, 113 So. 447 (1927); Bell v. Bell, 214 Ala. 573, 108 So. 375 (1926); Alabama Digest, Vol. 5-A, Costs, Key No. 172.

Where a statute does authorize the recovery of attorneys' fees, a landowner may recover them. Mobile Housing Board v. Cross, 285 Ala. 94, 229 So. 2d 485 (1969). Title 19, Section `0, Code, does not authorize the recovery of litigation expenses, however.

The landowners' other theories are based on the proposition that attorneys' fees and expenses are embraced within "just compensation" in eminent domain proceedings.

Although Alabama appellate courts apparently have not passed on this particular question, the Supreme Court of the United States has. In Monongahela Navigation Co. v. United States, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463 (1893), Mr. Justice Brewer spelled out what the words "just compensation" mean. He wrote:

> "The language used in the Fifth Amendment in respect to this matter is happily chosen. The entire amendment is a ser-

ies of negations, denials of right or power in the government, the last, the one in point here, being, 'Nor shall private property be taken for public use without just compensation.' The noun 'compensation,' standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. And this just compensation, it will be noticed, is for the property, and not to the owner. Every other clause

> in this Fifth Amendment is personal. 'No person shall be held to answer for a capital, or otherwise infamous crime,' etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the 'just compensation' is to be a full equivalent for the property taken." [Emphasis added.]

The right to recover attorneys' fees from one's opponent in litigation as part of the costs thereof did not exist at common law. see annotation, Eminent Domain - Attorneys' Fees, 26 A.L.R. 2d 1295.

Several state appellate courts have construed provisions in condemnation statutes and constitutions for the payment of compensation or "just compensation" as not to include attorneys' fees within those terms. United States v. 23.94 Acres of Land, 325 F. Supp. 330 (D.C. Va. 1970); United States v. 254.35 Acres of Land, 46 F. Supp. 913 (D.C. La. 1942); County of Los Angeles v. Ortiz, 6 Cal. 3d 141, 490 P. 2d 1142, 98 Cal. Rptr. 454 (1971); Pacific Gas & Electric Co. v. Chubb, 24 Cal. App. 265, 141 P. 36 (1914), Schneider v. Schneider, 36 Colo. 518, 86 P. 347 (1906); Seban v. Dade County, 102 S. 2d 706 (Fla. 1950);

Bowers v. Fulton County, 227 Ga. 814, 183 S.E. 2d 347 (1971); Ottumwa v. Taylor, 102 N.W. 2d 376 (Iowa 1960); Welton v. Iowa State Highway Commission, 211 Iowa 625, 233 N.W. 876 (1930); Muskegon v. Slater, 379 Mich. 466, 152 N.W. 2d 652 (1967); Petition of Reeder, 110 Ore. 484, 222 P. 724 (1924); North America Realty Co. v. Milwaukee, 189 Wis. 585, 208 N.W. 489 (1926).

Of course, when state statutes permit landowners to recover their litigation expenses, they may do so. Mobile Housing Board v. Cross, supra; State of Washington v. Roth, 479 P. 2d 55 (Wash. 1971).

We note that the Uniform Eminent Domain Code promulgated by the National Conference of Commissioners on Uniform State Laws at its annual meeting held in August, 1974, makes provision for a landowner to recover litigation expenses under certain circumstances. Section 1205 of the Uniform Eminent Domain Code provides:

> "[Recoverable Costs.]
> "(a) If the judgment determines that the plaintiff has the right to take all or part of the defendant's property, the costs incurred by the defendant shall be claimed, taxed and awarded to the defendant by the same procedure as in other civil actions, except as otherwise provided in this section.

"(b) If the amount of compensation awarded to the defendant by the judgment, exclusive of interest and costs, is equal to or greater than the amount specified in the last offer of settlement made by the defendant under Section 704, the court shall allow to the defendant, in addition to costs allowed under Subsection (a) his litigation expenses, but not more than the greater of [ ] dollars or [25]% of the amount by which the compensation awarded exceeds the amount of the plaintiff's last offer of settlement made under Section 203 or Section 704.

"[(c) If the amount of compensation awarded to the defendant by the judgment, exclusive of interest and costs, is equal to or less than the amount specified in the last offer of settlement made by the plaintiff under Section 704, the defendant shall not be entitled to his costs incurred after the date of service of the offer.]

"Comment

"Section 1205 provides the basic rules governing the award and allocation of costs. For the definition of 'costs,' see Section 103(8).

"The general principle underlying this section, and expressed

in Subsection (a), is that when the condemnor is determined to have the right to take the property in question, the recoverable costs of litigation should ordinarily be awarded to the defendant property owner. This rule appears to be generally accepted among American courts, and in some states is regarded as constitutionally required. See Levey, Condemnation in U.S.A. §47, pp. 463-64 (1969).

"Subsections (b) and (c) are designed to correlate with the provisions of Section 704, under which either party may tender a final offer of settlement prior to trial. If such an offer by the defendant is not accepted, an award of litigation expenses is made to the defendant if he obtains an award more favorable than his final settlement offer. Subsection (b). Non-acceptances of a final offer of settlement by the plaintiff may result in a denial of costs to the defendant under Subsection (c), if the plaintiff obtains a result equal to or more favorable than the offer. Subsection (c), however, is in brackets to indicate that it should

be omitted if a withholding of costs in the adopting state would violate state constitutional requirements."

Alabama has not adopted the Uniform Code or any other statute which would permit the landowners here to recover their litigation expenses.

Heflin, C.J., Merrill, Bloodworth, Almon, Shores and Embry, JJ., concur.

Faulkner and Jones, JJ., dissent.

JONES, JUSTICE (Dissenting):

I respectfully dissent. I would frame the issue thus: Does "just compensation", as constitutionally employed in eminent domain proceedings, mean full and unequivocally comprehensive payment, including attorney's fees and costs of litigation, for property taken? Alternatively stated, the sole and precise issue presented by this case of first impression is whether "reasonable compensation" is denied the property owner where he must pay the costs of litigation, including the attorney's fees, out of the award received based on his property's value?

I agree that Tit. 19, § 30, Code, does not support the property owner's position. In other words, I am in accord with the majority opinion that there is no statutory authority allowing the property owner attorney's fees

or other costs incident to litigation.

The property owners next contend that fundamental justice and reason support their argument with respect to the term "just compensation", as that term is used in § 23 of Art. 1, Constitution of Alabama 1901. With this contention, I agree.

A condemnation proceeding is sui generis, totally unlike any other legal right, claim, or suit for damages known to our law. Issues of culpability, retribution for wrong, or civil liability comprise no part of such proceedings; and, unlike other civil actions, the right of recovery in a condemnation proceeding is rarely, if ever, contested. Consequently, the traditional rule allowing attorney's fees and other expenses only by statute, contract, or recognized equitable principles can hardly be said to control here.

While the power of eminent domain is an attribute of sovereignty, it is constitutionally restricted by the requirement: "unless just compensation be made therefor." This constitutional restriction recognizes that the sovereign power of appropriation is in derogation of the common and established inalienable right of property ownership. It is this expression embodied in the basic law which says in effect that while a taking of private property for public use can be forced and involuntary from the standpoint of the property

owner, the citizenry that make up the body politic for whose benefit the property is taken must make whole such private owner from the common source.

As this Court has held, the purpose of condemnation is to effect an involuntary transfer of land, and eminent domain is in the nature of a forced sale of property rights for an amount of money equal to its value. Beeland Wholesale Co. v. Kaufman, 234 Ala. 249, 174 So. 516 (1937); City Council of Montgomery v. Moore, 140 Ala. 638, 37 So. 291 (1903); London v. Sample Lumber Co., 91 Ala. 606, 8 So. 281 (1890). The safeguard, by which the State's inherent and unqualified power to appropriate private property is surrendered, is constitutionally mandated.

Thus, the procedure by which this mandate of "just compensation" may be effectually enforced in favor of the landowner cannot in reason and justice render him less than whole. A holding to the contrary writes into the meaning of "just compensation" a condition in derogation of the plain meaning of this term when taken in its constitutional context.

Necessarily, then, the definition of "just compensation" must be gleaned from the sui generis nature of condemnation proceedings. Alabama Pattern Jury Instructions, Eminent Domain, 14.05, contains the following defini-

tion:

> 'Just compensation means the payment of such sum of money to the property owner(s) that the owner(s) would be saved harmless as near as may be, and put in as near the same condition as such owner(s) would have been but for the taking."

Following the above suggested jury instruction, under "References," appears this supplemental definition·

> "The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken."

APJI, 14.07, defines Market Value:

> "Market value is the price the property would bring when offered for sale by a willing seller who is not forced to sell and which is sought by a willing buyer who is not required to buy, after due consideration of all the elements affecting value."

APJI, 14.15, contains the following instruction:

> "The landowners are entitled to recover the reasonable market value of the property taken as of the date of the taking.
>
> "The terms 'reasonable market value,' 'cash market value,' 'fair market value,' or 'fair cash market value' are considered substantially synonymous."

However scrupulously the jury by its verdict may heed these instructions, the property owner, when required to bear his own expenses of litigation, is not put in as good position pecuniarily as he would have occupied if his property had not been taken; nor does the "willing seller/willing buyer" test become a reality in affecting a net recovery to the property owner for the value of the property taken.

The end result of these declarations of the law, which find their source in the constitutional use of the term "just compensation," can be affected from the standpoint of the property owner only if he is allowed the additional recovery of the necessary and reasonable expenses incurred in pursuit of his remedy.

Other courts who, in the absence of the express statutory authority, allow reasonable expenses as costs against the condemnor likewise ground their holding

on the definition of "just compensation." The Supreme Court of Illinois in Dickson v. Epling, 48 N.E. 1001 (1897) stated:

> "Where private property is taken or damaged for public use, just compensation cannot be made to the property owner if he is compelled to prosecute in the courts for his just rights at his own costs."

The Supreme Court of California in City of Oakland v. Pacific Coast Lumber and Mill Company, 172 Cal. 332, 156 P. 468 (1960) stated:

> "It is settled law in this state that, in view of the provision of section 14 of article 1 of our constitution that 'private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner,' the owner whose property is thus sought to be taken cannot be required to pay any portion of his reasonable costs necessarily incidental to the trial of the issues on his part, or any part of the costs of the plaintiff; for to re-

> quire him to do this would reduce the just compensation awarded by the jury by a sum equal to that paid by him for such costs."

To rebut this definition with the contention that the property owner need not resort to litigation and incur the expenses incident thereto begs the question. Such contention overlooks the involuntariness of the property owner's position in the first instance, as well as his unqualified right to pursue the matter in litigation to obtain the highest value contended for. It is only fair and just, therefore, that the condemnor who initiates the proceeding should bear the necessary and reasonable expenses incident to the involuntary position in which the property owner is placed.

Additionally, the property owners argue that to disallow expenses of litigation as a part of "just compensation" placed an unfair weapon in the hands of the State in its negotiations with the property owner, and that this weapon is frequently used to compel the property owner to accept in settlement a sum less than the State's own appraised value. Whether this tactic is employed by the State, we need not decide, however, it is significant -- indeed persuasive -- that the subtle reality of this pressure exists even in the absence of any such overt threat. It is impli-

cit in the very nature of the negotiations. The property owner knows that if he declines the State's offer, he must expend a substantial amount of the total value received for his property in making the recovery. He is put to a choice, then, of accepting the State's offer or litigating at his own expense. In any event, this interpretation of "just compensation," at best, unnecessarily encourages a waiver of the property owner's constitutional right to full recovery for the value of the property taken.

The converse, on the other hand, is not true. Any property owner who sought to gamble for a higher recovery at the condemnor's expense runs the risk of having the trial court disallow the expenses of litigation where in retrospect the refused offer was a reasonable one. Otherwise stated, suppose a property owner refuses a $50,000 offer with the thought: "Why not litigate and risk a higher award since the costs of litigation is to be borne by the condemnor?" Suppose further that the jury awarded $40,000. In such event, the trial judge on motion for award of costs, applying the traditional rules governing such matters, could deny any additional recovery. This judicial discretion would serve as a safety valve against abuse by the property owner whereas no counterpart exists to stem abuse by the condemnor under the majority's interpretation.

The major opinion lays great stress on the interpretation of "just compensation" by the United States Supreme Court in Dohaney v. Rogers, 281 U.S. 362, 50 S.Ct. 299, 74 L. Ed. 904 (1930). There the issue was whether the substantive due process clause of the 5th Amendment to the Federal Constitution requires "just compensation" to include attorney's fees and other costs of litigation in eminent domain proceedings. Here, the Alabama Supreme Court is asked to interpret its own State Constitution; and Dohaney not only is not controlling, it is indeed poor precedent for the majority holding.

It is, to be sure, an anomaly of our jurisprudence that the United States Supreme Court has no difficulty in recognizing and applying the "independent state ground" doctrine while most state courts seem never to have heard of, much less apply, such doctrine.[1] Strikingly obvious, it seems to me, yet ignored by

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[1] See Oregon v. Hass, ___ U.S. ___, 95 S.Ct. 1215, 45 L.Ed.2d 570 (1975), in which Mr. Justice Blackmun, speaking for the majority, said: ". . . a state is free as a matter of its own law to impose greater restrictions . . . than those this Court holds to be necessary upon federal constitutional standards." See also my dissent in McKinney v. City of Birmingham, ___ Ala. ___, 296 So.2d 236 (1974).

the majority, is the fact that minimum federal constituional standards are not here in issue.

Finally, the State argues that, as a practical matter, condemnation awards, particularly jury verdicts, take into account items of necessary expenses incurred in litigation: and thus no declared interpretation favorable to the property owners' contention is necessary. This argument is to the effect that we should either condone or encourage dishonesty within the system. I would respectfully decline to do either. Any award which goes outside the bounds of competent testimony as to value of the property taken must, on review, be set aside as excessive. This Court should neither promulgate a new rule nor adhere to an old rule which has as its avowed purpose the condoning of false testimony as to value or which will reflect on the veracity of a jury verdict.

Rather, by our holding here, we should further assure the integrity of the system by recognizing and giving full effect to the rule of damages heretofore alluded to (APJI), and by permitting the trial court, upon motion of the property owner following the verdict, to assess as costs the necessary and reasonable expenses, if any.

I would reverse and remand.

Faulkner, J., concurs.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith, set out as same appears of record in said Court.

Witness my hand this 11 day of Sept., 1975.

/s/ J. O. Sentell

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APPENDIX A
#2
Order Denying Rehearing

Re: SC 974

Carolyn Drake White, et al — Appellant
State of Alabama — Appellee
vs.

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

___] Petition for Writ of Certiorari denied. No opinion.
___] Submitted on briefs
___] Appellant granted additional time to file transcript of record to and including
XXX] Application for rehearing overruled
___] Appell__ granted 15 additional days to file reply briefs to and including
___] Transcript filed (Notice under Rule 12)
___] Permission to file amicus curiae briefs granted
___] Permission to make additional assignments of error granted.
___]

/s/ J. O. Sentell
Clerk, Supreme Court
of Alabama

October 2, 1975

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APPENDIX B
Motion to Tax Costs

STATE OF ALABAMA	)	IN THE CIRCUIT
	)	
Plaintiff	)	COURT OF THE
	)	
Vs.	)	TENTH JUDICIAL
	)	
CAROLYN DRAKE WHITE, et al,	)	CIRCUIT OF
	)	
	)	ALABAMA
Defendant	)	CASE NO. 31990

MOTION FOR ORDER DIRECTING CIRCUIT CLERK TO TAX FURTHER AND ADDITIONAL COSTS AGAINST THE STATE OF ALABAMA

Defendant moves this Honorable Court foran order compelling and ordering the Circuit Court Clerk to tax as additional and further costs against THE STATE OF ALABAMA a sum of money in the amount of $35,000.00 in the above styled Case. Defendant has attached an Affidavit marked "Exhibit A" in definition of said costs.

Defendant further moves this Honorable Court for a further Order compelling the Circuit Court Clerk to pay from State Funds in its possession relating specifically to this Case or in the alternative pay from other State Funds in its possession which are due to be returned to the State of Alabama or in the alternative to pay out of

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funds when they become due to be returned to the State of Alabama a sum of money to wit: $35,000.00 as costs which are due to be taxed as costs against the State of Alabama and which are due to be paid the Defendant Property Owners as a result of said condemnation trial and subsequent to said costs being determined and calculated and taxed against the State of Alabama.

DEFENDANT offers and shows unto this Honorable Court that said sum is due to be taxed as costs against the State of Alabama and paid to the Defendant Property Owners in accordance with the Constitution of THE UNITED STATES OF AMERICA, THE CONSTITUTION OF THE STATE OF ALABAMA, THE STATUTORY LAW, THE CASE LAW OF ALABAMA, AND THE ALABAMA RULES OF CIVIL PROCEDURE.

Defendant further asks this Court for such other and further relief to which he might be entitled.

/s/ John H. Lavette,
Attorney for Defendant
2316 10th Avenue South
Birmingham, Alabama
35205

Please take notice that the foregoing and above Motion will be presented to the Honorable Thomas B. Huey, Jr., presiding Judge of the Tenth Judicial Circuit at 10:00 A.M. on the 8th day of August, 1974.

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Defendant desires to be heard orally on said Motion.

CERTIFICATE OF SERVICE

I hereby certify that I have mailed, by First Class United States Mail, properly addressed and postage prepaid to Mr. Roy Landrum, Counsel for Plaintiff, at Frank Nelson Building, Birmingham, Alabama and Mr. Tom Coleman, Counsel for Plaintiff, at City Federal Building, Birmingham, Alabama, a copy of the foregoing Motion on this the 26th day of July, 1974.

/s/ John H. Lavette,
Attorney for Defendants

STATE OF ALABAMA)
)
JEFFERSON COUNTY)

AFFIDAVIT

My name is ALBERT BOUTWELL. I am one of the Attorneys for DEFENDANT PROPERTY OWNERS IN THE CASE OF STATE OF ALABAMA Vs. CAROLYN DRAKE WHITE, et al. CASE NO. 31999. THE COSTS OF TRIAL necessary for said DEFENDANT PROPERTY OWNERS to defend themselves and their property against The State of Alabama have been determined this day. These costs, resulting to Property Owners by action of The State of Alabama and by the necessity of having to defend themselves and their property against The State of Alabama are as follows

Appraisal Fees, Photographs, Deeds, Maps, Survey Drawings, Depositions, Discovery Procedure, etc.----------	$ 11,332.71
Attorney Fees -------	23,666.95
Total Costs---------	$ 34,999.66
	or
	$ 35,000.00

I do hereby swear, state and affirm that the above facts are true and correct. Done on this the 26th day of July, 1974.

/s/ Albert Boutwell

STATE OF ALABAMA)
)
JEFFERSON COUNTY)

I, the undersigned, a Notary Public in and for said County, in said State, hereby certify that ALBERT BOUTWELL whose name is signed to the foregoing affidavit, and who is known to me, acknowledged before me on this day, that, being informed of the contents of the affidavit he executed the same voluntarily on the day the same bears date.

Given under my hand and Official Seal this 26th day of July, 1974.

/s/ Doris M. Gillespie
Notary Public

"EXHIBIT A"

APPENDIX C
Order of Circuit Court

IN THE CIRCUIT COURT OF THE TENTH
JUDICIAL CIRCUIT IN AND FOR
JEFFERSON COUNTY, ALABAMA

STATE OF ALABAMA,	)	
	)	
PLAINTIFF,	)	
	)	
VS.	)	CASE NO.
	)	
CAROLYN DRAKE WHITE,	)	31990
	)	
DEFENDANT.	)	

C A P T I O N

THE ABOVE ENTITLED CAUSE came on to be heard before the Honorable Whit Windham, Judge, on the 16th day of August, 1974, commencing at or about 10:00 A.M.

ORDER ON MOTION

August 16, 1974: This motion heard and considered, and the same is overruled; and the movent duly and legally reserves an exception.

Judge Windham

APPENDIX D
Assignments of Error

IN THE SUPREME COURT OF ALABAMA

CAROLINE DRAKE WHITE, MARY LYTLE WHITE AND NOAH LYTLE WHITE	)	ON APPEAL FROM
	)	THE CIRCUIT COURT
	)	FOR THE TENTH
Defendant Appellants	)	JUDICIAL CIRCUIT
	)	
V.	)	OF ALABAMA
	)	
STATE OF ALABAMA	)	CIVIL ACTION NO.
	)	
Plaintiff, Appellees	)	31990

ASSIGNMENTS OF ERROR

Come now CAROLINE DRAKE WHITE, MARY LYTLE WHITE AND NOAH LYTLE WHITE, separately and severally, Defendants, Appellants, in the above styled cause and respectfully show and aver that the following separate and several errors occurred and were committed in the Trial Court, to the hurt and prejudice of Defendants, Appellants:

1. The Court erred in that at a time subsequent to the trial of said condemnation case it did not on its own motion require a hearing to be held and further evidence taken, if need be, to determine what elements of cost and what

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amount of cost should be further and additionally taxed against the State of Alabama in such amount and manner as to fully and orderly provide the Defendant property owners with "Due Process of Law" and/or "Just Compensation" or otherwise "Make Them Whole." (R.26)

2. The Court erred at a time subsequent to the trial of said condemnation case in overruling Defendants Appellants' motion to tax further and additional costs against Plaintiff Appellees, State of Alabama, in that amount as claimed by the Property Owner Appellants. (R.26)

3. The Court erred at a time subsequent to the trial of said condemnation case in overruling Defendants Appellants' motion to tax further and additional costs against Plaintiff Appellees, State of Alabama, in a different but reasonable and equitable amount from that claimed by the Property Owner Appellants or in any such amount and manner as to fully and orderly provide the Defendant Property Owners with "Due Process of Law" and/or "Just Compensation" or otherwise "Make Them Whole" as guaranteed under the Law. (R.26)

4. The Court erred in refusing to tax as additional and further costs against the State of Alabama Defendant Property Owners' Attorney Fees incurred in said action. (R.26)

5. The Court erred in refusing to tax as additional and further costs against the State of Alabama a reasonable and equitable sum of money for Defendant Property Owners' Attorney Fees incurred in said action. (R.26)

6. The Court erred in refusing to tax as additional and further costs against the State of Alabama Defendant Property Owners' Expert Appraisal Witness Fees incurred in said action. (R.26)

7. The Court erred in refusing to tax as additional and further costs against the State of Alabama a reasonable and equitable sum of money for Defendant Property Owners' Expert Appraisal Witness Fees incurred in said action. (R.26)

8. The Court erred in refusing to tax as additional and further costs against the State of Alabama Defendant Property Owners' Expenses for Photographs, Deeds, Maps, Survey Drawings, Depositions, Discovery Procedures, Exhibits, etc., incurred in said action. (R.26)

9. The Court erred in refusing to tax as additional and further costs against the State of Alabama a reasonable and equitable sum of money for Defendant Property Owners' Expenses for Photographs, Deeds, Maps, Survey Drawings, Depositions, Discovery Procedures,

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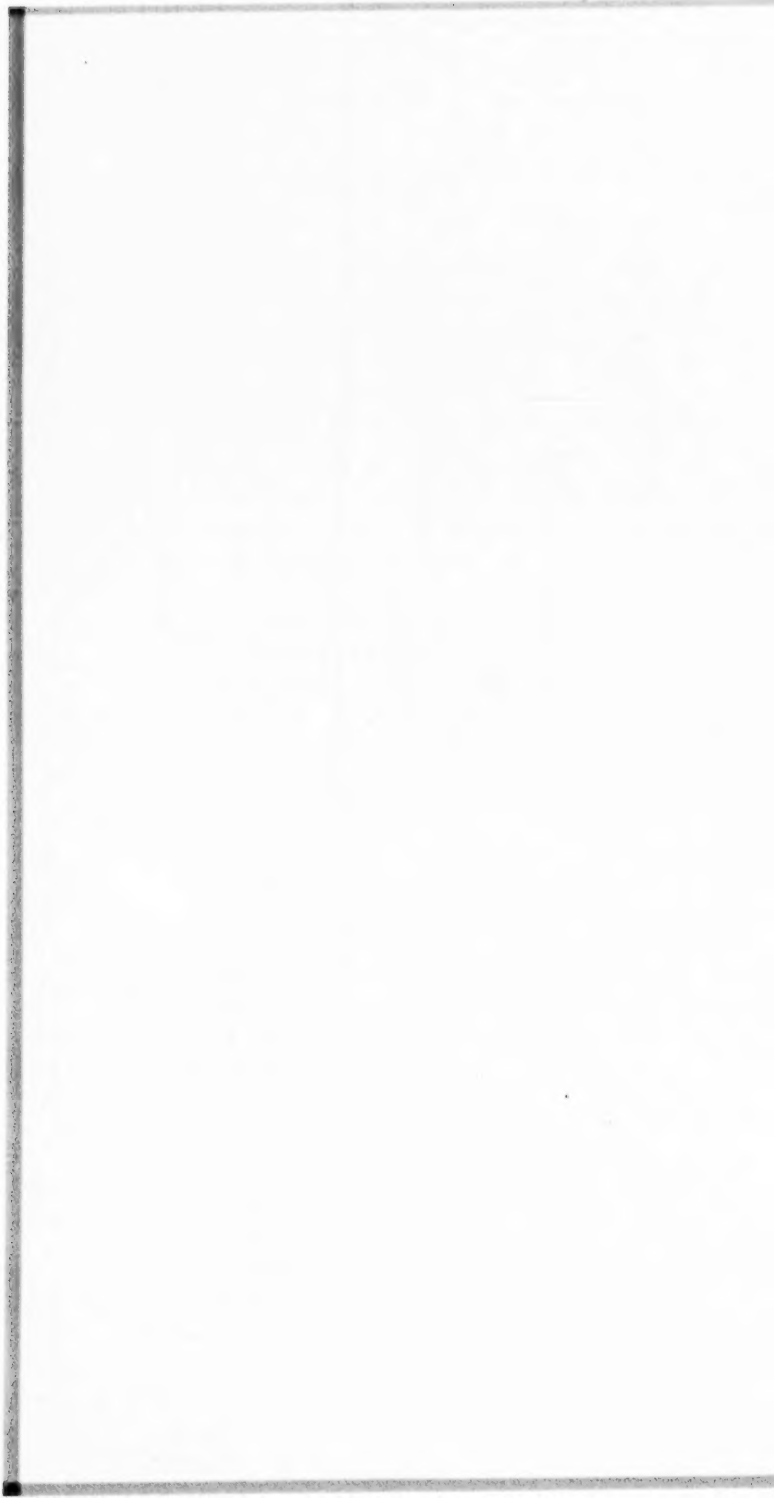
Exhibits, etc., incurred in said action. (R.26)

10. The Court erred in that at a time subsequent to said Condemnation Trial and in response to a motion it failed to grant in any form "Such Other and Further Relief" to which Appellant Property Owners were entitled and which relief would serve to "Make said Appellant Property Owners Whole," provide them with "Due Process of Law" and/or with 'Just Compensation." (R.26)

11. The Court erred in overruling Appellants' Motion to tax as costs against the State of Alabama the Expenses, Attorney Fees, and Appraisal Expert Witness Fees incurred by Appellants as set forth in said Motion. (R. 26)

12. The Court erred in overruling Appellants' Motion to tax as costs against the State of Alabama the Expenses, Attorney Fees, and Appraisal Expert Witness Fees incurred by Appellants as set forth in said Motion and denied to Appellants just compensation for their property taken. (R.26)

/s/ John H. Lavette
Attorney for Defendants Appellants
2316 10th Avenue South
Birmingham, Alabama
35205



CERTIFICATE OF SERVICE

I hereby certify that I have mailed by First Class United States Mail, properly addressed and postage prepaid, to Mr. Art Hanes at his Office in the Frank Nelson Bbilding, Birmingham, Alabama, 35203, and to Mr. Roy G. Landrum at his Office in the Frank Nelson Building, Birmingham, Alabama, 35203 and to Mr. Thomas Coleman at his Office in the City Federal Building, Birmingham, Alabama, 35203, a copy of the foregoing Assignments of Error this 26th day of February, 1975.

/s/ John H. Lavette